

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1371

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1371

UNITED STATES OF AMERICA,

Appellant,

—v.—

SALVATORE COLETTA,

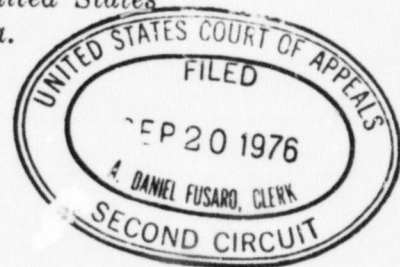
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

BARBARA J. AMBLER,
*Special Attorney,
Department of Justice,*
AUDREY STRAUSS,
*Assistant United States Attorney,
Of Counsel.*



PAGINATION AS IN ORIGINAL COPY

INDEX TO APPENDIX

page

Docket entries	A-1
Indictment	A-6
Notice of motion	A-15
Affidavit of Robert Goldman	A-16
Stipulation	A-25
Affidavit of Barbara S. Ambler	A-27
Government's memorandum of law	A-29
Defendant's memorandum of law	A-36
Opinion	A-55

A 1

D. C. Form No. 100
CRIMINAL DOCKET

~~WEEKER~~ ~~FILE~~ ~~WEEKER~~ 74 CRIM. 289

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.:
VS.	William L. Aronwald, AUSA
GEORGE GAMALDI-1,4,7,10 11/19/75	264-3930
BLASE IOVINO-2,5,8,11 3/25/76	
SALVATORE COLETTA-3,6,9,12 7/9/76	
	For Defendant: ALL DEFTS.
	Kuh, Goldman, Cooperman & Levit
	800 3rd Ave, NYC 10022 688-70

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
(03)					
Fine,					
Clerk,					
Marshal,					
Attorney,					
CHAMBERLAIN & CO. 26					
WICKER 7201					
Income tax evasion.					
Twelve Counts)					

DATE	PROCEEDINGS
3-21-74	Filed indictment ordered sealed. B/W ordered & issued. Pollack, J.
3-25-74	Indictment ordered unsealed, Motley, J.
	Deft. Gamaldi (atty. present) Pleads not guilty. Bail fixed at \$25,000. secured by his property in Patchogue, L.I. Bail limits to include Conn. Mass. and N.J.
	Deft. Iovino (atty. present) Pleads not guilty. Bail fixed at \$25,000. secured by his property in Roslyn, L.I.
	Deft. Coletta (atty. present) Pleads not guilty. Bail fixed at \$25,000. to be secured by his property in New Hyde Park. Bail limits to be extended to the EDNY. Case assigned to Judge Pierce for all purposes.
	Motley, J.

BEST COPY AVAILABLE

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
3-22-74	GEORGE GAMALDI- Filed Warrant for Arrest with marshal's return- Executed same on 3-25-74.		
3-22-74	BLASE IOVINO- Filed Warrant for Arrest with marshal's return- Executed same on 3-25-74.		
3-22-74	SALVATORE COLETTA- Filed Warrant for Arrest with marshal's return- Executed same on 3-25-74.		
3-25-74	GEORGE GAMALDI Filed P.R.B. Without Security in the sum of \$25,000., + deed of House to be held as Collateral - acknowledged by the CLERK.		
3-25-74	BLASE IOVINO- Filed P.R.B. Without Security in the sum of \$25,000. + Deed of House to be held as Collateral - acknowledged by the CLERK.		
3-25-74	SALVATORE COLETTA- Filed P.R.B. Without Security in the sum of \$25,000. + Deed of house as Collateral - acknowledged by the CLERK.		
4-1-74	GEORGE GAMALDI-Filed notice of appearance of Peter J. LaBarbera 350 5th Ave. N.Y.C. 10001 A 6-5730		
4-2-74	SALVATORE COLETTA-Filed notice of appearance of Robert E. Goldman 800 3rd Ave. N.Y.C. 688-7000.		
4-2-74	BLASE IOVINO-Filed notice of appearance of Robert E. Goldman 800 3rd Ave. N.Y.C. 688-7000		
7-10-74	GEORGE GAMALDI, BLASE IOVINO & SALVATORE COLETTA-Filed def's'. affidavit and notice of motion for a bill of particulars, discovery, suppression and severing the trials ret. 8-20-74.		
7-26-74	GEORGE GAMALDI, BLASE IOVINO & SALVATORE COLETTA-Filed Govt's. response to def's motion dated 7-10-74.		
7-15-74	Pre-trial conference held. Atty. for deft. Gamaldi is now Robert E. Goldman. Trial set for 11-22-74 at 9:30 am Room 2703. Pierce, J.		

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Judge
9-27-74	Pre-Trial Conference before Judge Werker.	
10-10-74	Filed Govt. Memorandum of Law	
10-18-74	Filed Notice of motion (dtd 7/10/74) received this date, severing trials etc.	
Oct. 17-74	Filed OPINION #41323...In light of the clear wording of Rule 8(b) and of the equally succinct analysis of the rule in Granello, the leading case on this issue in our circuit, defts' motion for severance must be granted. So ordered- WERKER, J. (m/n)	
Dec 12-74	PRE-TRIAL CONFERENCE HELD BY (m/n)	
03-04-75	All defts.--Filed defts. affdt. and notice of motion for an order dismissing indictment ret. on: March 18, 1975 at 9:30am.	
06-26-75	ALL DEFTS.--Filed govts. affdt. in response by Barbary Ambler,	
06-26-75	All Defts.--Filed defts. memorandum of law in support of motion to dismiss.	
06-26-75	All defts.--Filed govts. memorandum of law..	
06-26-75	All defts.--Filed memorandum endorsed on defts. motion dated March 4, 1975---Motion denied. See Persico, 2nd Cir. June 19, 1975. So ordered, Werker, J. m/n	
11-5-75	GEORGE GAMALDI--Filed govts. response affdt. of Barbara Ambler.	
11-5-75	GEORGE GAMALDI--Filed govts. memorandum of law.	
11-7-75	GAMALDI-- Motion to quash subpoena denied after argument. So ordered, Werker, J.	
11-12-75	IOVINO & COLETTA--severed for trial.	
11-12-75	GAMALDI--Motion to suppress tapes, hearing begun.	
11-14-75	BAMALDI-- Suppression hearing contd. and concluded. Motion granted. Werker, J.	
11-17-75	PRE-TRIAL CONFERENCE HELD BY (m/n)	
11-17-75	GAMALDI--Motion to quash subpoena denied after argument. Werker, J.	
11-12-75	IOVINO COLETTA-- Defts. severed for trial from deft. Gamaldi. Werker, J.	
11-17-75	GAMALDI--(atty. present)--Jury trial begun and continued before Werker, J.	
11-18-75	GAMALDI--Jury trial contd.	
11-19-75	GAMALDI--jury trial continues. Govt. rests. Deft. moves to dismiss indictment--GRANTED, as to said deft. as to each of the 4 cts. of this indictment. Jurors excused with thanks of Court. Bail exonerated. Werker, J.	

DATE	PROCEEDINGS	Date of Judgment
11-18-75	Filed memo endorsed on motion filed on 11-6-75 in chambers and entered on docket herewith: Motion denied following argument. So ordered. -- Werker, J. m.n. and Filed affdvt. and notice of motion by C.P. Sales Inc. and Cedar Rapids Fabricators Inc. to quash subp. duces tecum. (denied see above memo.)	
11-18-75	GAMALDI- Filed deft's affdvt. and notice of motion to quash subpoena -	
11-18-75	GAMALDI- Filed memo endorsed on above motion to quash: Motion denied after argument. So ordered. -- Werker, J. m.n.	
12-9-75	GAMALDI--Filed defts. affdvt. and notice of motion for suppression, etc. ret. on: Nov. 18, 1975.	
12-9-75	GAMALDI--Filed govts. memorandum of law.	
12-9-75	GAMALDI--Filed govts. supplemental memorandum.	
12-9-75	GAMALDI--Filed defts. memoranda of law in opposition to govts. motion to use a suppressed wiretap tape during cross-exam. should deft. testify in his own behalf.	
12-9-75	GAMALDI--Filed defts. memorandum of law in support of motion to suppress.	
12-9-75	GAMALDI-- Filed OPINION #43502--Defts. motion to suppress is granted. So ordered, Werker, J. m/n	
12-23-75	GAMALDI--Filed transcript of record of proceedings dated Nov. 17, 18, 19, 1975.	
12-23-75	IOVINO COLETTA--A.U.S.A. Barbara Ambler states for record that these defts. will be nolle. Werker, J.	
12-17-75	GAMALDI--Filed govts. notice of appeal to the USCA granting said defts. motion to dismiss ct. 4 of indictment. (copies mailed to defts. atty, Robert Goldman of 800 3rd Ave, NYC)	
1-7-76	G. GAMALDI--Filed transcript dated Nov. 12, 1975.	
1-6-76	G. GAMALDI--Filed notice that the original record on appeal has been certified and transmitted to the USCA this date.	
02-17-76	Filed transcript of record of proceedings dated Nov. 12, 14, 17, 1975.	
02-18-76	GAMALDI--Filed true copy of notice of motion filed in the USCA to dismiss the appeal, So ordered, Clark (USCA) m/n	
3-25-76	BLASE IOVINO-- Govt. moves to dismiss--GRANTED. Werker, J.	
3-25-76	S. COLETTA--Stipulation to facts and to move for dismissal by April 2, 1976. Werker, J.	
4-2-76	STEVATORE COLETTA- Filed AFFID & Notice of motion Dismissing the indictment, 4-27-76	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

6

UNITED STATES OF AMERICA :

- v - :

GEORGE GAMALDI,
BLASE IOVINO, and
SALVATORE COLETTA,

Defendants :

Rice
INDICTMENT

74 Cr 289

INTRODUCTION

1. At all times referred to herein the defendant GEORGE GAMALDI was a Vice President of Hills Supermarkets, Inc., in charge of operations.
2. At all times referred to herein the defendant BLASE IOVINO was a meat buyer for Hills Supermarkets, Inc.
3. At all times referred to herein the defendant SALVATORE COLETTA was a Vice President of Hills Supermarkets, Inc., in charge of meat operations.

COUNT ONE

The Grand Jury charges:

From on or about January 1, 1968 up to and including on or about December 31, 1968, in the Southern District of New York, GEORGE GAMALDI, the defendant, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by him to the United States of America for the calendar year 1968, by affirmative acts of concealment and attempting to conceal and by receiving cash kick-back payments from officials and employees of various wholesale suppliers of meat products, in return for the purchases of meat products by Hills Supermarkets, Inc., and having received said currency in the Southern District of New York, the said GEORGE GAMALDI did, on or about April 15, 1969, file with the Internal Revenue Service, a false and fraudulent

joint income tax return, on behalf of himself and his wife, for the year 1968, wherein he omitted these cash payments and stated that their taxable income for said calendar year was the sum of \$19,810.00 and that the amount of tax due and owing thereon was the sum of \$4,652.00, whereas as he then and there well knew, their taxable income for the said calendar year was approximately the sum of \$66,810.00, upon which said taxable income they owed to the United States of America an income tax of \$27,822.84.

(Title 26, United States Code, Section 7201)

COUNT TWO

The Grand Jury further charges:

From on or about January 1, 1968, up to and including December 31, 1968, in the Southern District of New York, BLASE IOVINO, the defendant, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by him to the United States of America for the calendar year 1968, by affirmative acts of concealment and by attempting to conceal and by receiving cash kick-back payments from officials and employees of various wholesale suppliers of meat products, in return for the purchases of meat products by Hills Supermarkets, Inc., and having received said currency in the Southern District of New York the said BLASE IOVINO did, on or about April 15, 1969, file with the Internal Revenue Service a false and fraudulent joint income tax return, on behalf of himself and his wife, for the year 1968, wherein he omitted these cash payments and stated that their taxable income for said calendar year was the sum of \$17,458.23 and that the amount of tax due and owing thereon was the sum of \$3,943.42, whereas as he then and there well knew, their taxable income for said calendar year was approximately the sum of \$97,958.23, upon which said taxable income they owed to the United States of America an income tax of \$47,251.58.

(Title 26, United States Code, Section 7201)

COUNT THREE

The Grand Jury further charges:

On or about the 15th day of April, 1969, in the Southern District of New York, the defendant SALVATORE COLETTA, who during the calendar year 1968 was married, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1968, by preparing and causing to be prepared a false and fraudulent joint income tax return on behalf of himself and his wife which was filed with the Internal Revenue Service, wherein it was stated that their taxable income for said calendar year was the sum of \$17,348.00 and that the amount of tax due and owing thereon was the sum of \$2,195.00, whereas as he then and there well knew, their taxable income for said calendar year was approximately the sum of \$97,848.00, upon which said taxable income they owed to the United States of America an income tax of \$45,465.46.

2. The unreported income in the approximate amount of \$80,500.00 represented cash kick-backs paid to and or behalf of the defendant SALVATORE COLETTA by officials and employees of various wholesale suppliers of meat products in return for purchases of meat products by Hills Supermarkets, Inc.

(Title 26, United States Code, Section 7201)

COUNT FOUR

The Grand Jury further charges:

From on or about January 1, 1969 up to and including on or about December 31, 1969, in the Southern District of New York, GEORGE GAMALDI, the defendant, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by him to the United States of America for the calendar year 1969, by affirmative acts of concealment and by attempting to conceal and by receiving cash kick-back payments from officials and employees of various wholesale suppliers of meat products, in

return for the purchases of meat products by Hills Supermarkets, Inc., and having received said currency in the Southern District of New York, the said GEORGE GAMALDI did, on or about April 15, 1970, file with the Internal Revenue Service, a false and fraudulent Individual Income Tax return, for the year 1969, wherein he omitted these cash payments and stated that his taxable income for said calendar year was the sum of \$18,181.00 and that the amount of tax due and owing thereon was the sum of \$4,258.00, whereas as he then and there well knew, his taxable income for the said calendar year was approximately the sum of \$111,181.00, upon which said taxable income he owed to the United States of America an income tax of \$57,323.44.

(Title 26, United States Code, Section 7201)

COUNT FIVE

The Grand Jury further charges:

From on or about January 1, 1969, up to and including December 31, 1969, in the Southern District of New York, BLASE IOVINO, the defendant, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by him to the United States of America for the calendar year 1969, by affirmative acts of concealment and by attempting to conceal and by receiving cash kick-back payments from officials and employees of various wholesale suppliers of meat products, in return for the purchases of meat products by Hills Supermarkets, Inc., and having received said currency in the Southern District of New York the said BLASE IOVINO did, on or about April 15, 1970, file with the Internal Revenue Service a false and fraudulent joint income tax return on behalf of himself and his wife, for the year 1969, wherein he omitted these cash payments and stated that their taxable income for said calendar year was the sum of \$16,437.34 and that the amount of tax due and owing thereon was the sum of \$3,720.70 whereas as he then and there well knew, their taxable income for said calendar year was approximately \$108,437.34, upon which said

taxable income they owed to the United States of America an income tax of \$55,452.27.

(Title 26, United States Code, Section 7201)

COUNT SIX

The Grand Jury further charges:

On or about the 15th day of April, 1970, in the Southern District of New York, the defendant SALVATORE COLETTA, who during the calendar year 1969 was married, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1969, by preparing and causing to be prepared a false and fraudulent joint income tax return on behalf of himself and his wife which was filed with the Internal Revenue Service, wherein it was stated that their taxable income for said calendar year was the sum of \$50,203.00 and that the amount of tax due and owing thereon was the sum of \$15,895.00, whereas as he then and there well knew, their taxable income for said calendar year was approximately the sum of \$142,203.00, upon which said taxable income they owed to the United States of America an income tax of \$75,793.08.

2. The unreported income in the approximate amount of \$92,000.00 represented cash kick-backs paid to and on behalf of the defendant SALVATORE COLETTA by officials and employees of various wholesale suppliers of meat products in return for purchases of meat products by Hills Supermarkets, Inc.

(Title 26, United States Code, Section 7201)

COUNT SEVEN

The Grand Jury further charges:

From on or about January 1, 1970 up to and including on or about December 31, 1970, in the Southern District of New York, GEORGE GAMALDI, the defendant, did unlawfully, wilfully and knowingly attempt to evade or defeat a large part of the income taxes due and owing by him to the United States of America for the calendar year 1970, by affirmative acts of concealment and by

attempting to conceal and by receiving cash kick-back payments from officials and employees of various wholesale suppliers of meat products, in return for the purchases of meat products by Hills Supermarkets, Inc., and having received said currency in the Southern District of New York, the said GEORGE GAMALDI did, on or about April 15, 1971, file with the Internal Revenue Service, a false and fraudulent Individual Income Tax return, for the year 1970, wherein he omitted these cash payments and stated that his taxable income for said calendar year was the sum of \$18,941.00 and that the amount of tax due and owing thereon was the sum of \$4,185.00, whereas as he then and there well knew, his taxable income for the said calendar year was approximately the sum of \$111,941.00, upon which said taxable income he owed to the United States of America an income tax of \$53,898.00.

(Title 26, United States Code, Section 7201)

COUNT EIGHT

The Grand Jury further charges:

From on or about January 1, 1970, up to and including December 31, 1970, in the Southern District of New York, BLASE IOVINO, the defendant, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by him to the United States of America for the calendar year 1970, by affirmative acts of concealment and at attempting to conceal and by receiving cash kick-back payments from officials and employees of various wholesale suppliers of meat products, in return for the purchases of meat products by Hills Supermarkets, Inc., and having received said currency in the Southern District of New York the said BLASE IOVINO did, on or about April 15, 1971, file with the Internal Revenue Service a false and fraudulent joint income tax return, on behalf of himself and his wife, for the year 1970, wherein he omitted these cash payments and stated that their taxable income for said calendar year was the sum of \$16,648.58 and that the amount of tax due and owing thereon was the sum of \$3,527.64, whereas as he then and there well knew,

7.
their taxable income for said calendar year was approximately the sum of \$108,648.58, upon which said taxable income they owed to the United States of America an income tax of \$51,805.67.

(Title 26, United States Code, Section 7201)

COUNT NINE

The Grand Jury further charges:

On or about the 15th day of April, 1971, in the Southern District of New York, the defendant SALVATORE COLETTA, who during the calendar year 1970 was married, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1970, by preparing and causing to be prepared a false and fraudulent joint income tax return on behalf of himself and his wife which was filed with the Internal Revenue Service, wherein it was stated that their taxable income for said calendar year was the sum of \$51,345.00 and that the amount of tax due and owing thereon was the sum of \$14,693.00, whereas as he then and there well knew, their taxable income for said calendar year was approximately the sum of \$146,119.05, upon which said taxable income they owed to the United States of America an income tax of \$71,959.00.

2. The unreported income in the approximate amount of \$95,774.05 represented cash kick-backs paid to and on behalf of the defendant SALVATORE COLETTA by officials and employees of various wholesale suppliers of meat products in return for purchases of meat products by Hills Supermarkets, Inc.

(Title 26, United States Code, Section 7201)

COUNT TEN

The Grand Jury further charges:

From on or about January 1, 1971 up to and including on or about December 31, 1971, in the Southern District of New York, GEORGE GAMALDI, the defendant, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income

taxes due and owing by him to the United States of America for the calendar year 1971, by affirmative acts of concealment and by attempting to conceal and by receiving cash kick-back payments from officials and employees of various wholesale suppliers of meat products, in return for the purchases of meat products by Hills Supermarkets, Inc., and having received said currency in the Southern District of New York, the said GEORGE GAMALDI did, on or about April 15, 1972, file with the Internal Revenue Service, a false and fraudulent joint income tax return on behalf of himself and his wife, for the year 1971, wherein he omitted these cash payments and stated that their taxable income for said calendar year was the sum of \$21,328.00 and that the amount of tax due and owing thereon was the sum of \$4,672.00, whereas as he then and there well knew, their taxable income for the said calendar year was approximately the sum of \$55,661.00, upon which said taxable income they owed to the United States of America an income tax of \$19,867.33.

(Title 26, United States Code, Section 7201)

COUNT ELEVEN

The Grand Jury further charges:

From on or about January 1, 1971 up to and including on or about December 31, 1971, in the Southern District of New York, BLASE IOVINO, the defendant, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by him to the United States of America for the calendar year 1971, by affirmative acts of concealment and by attempting to conceal and by receiving cash kick-back payments from officials and employees of various wholesale suppliers of meat products, in return for the purchases of meat products by Hills Supermarkets, Inc., and having received said currency in the Southern District of New York the said BLASE IOVINO did, on or about April 15, 1972 file with the Internal Revenue Service a false and fraudulent joint income tax return on behalf of himself and his wife, for the year 1971, wherein he omitted these cash payments and stated that their taxable income for said calendar year was the sum of \$27,190.11 and that the amount of tax due and owing thereon was the sum of \$6,808.44, whereas as he then and there well knew, their taxable

income for said calendar year was approximately the sum of \$60,523.11, upon which said taxable income they owed to the United States of America an income tax of \$22,568.44.

(Title 26, United States Code, Section 7201)

COUNT TWELVE

The Grand Jury further charges:

On or about the 5th day of April, 1972, in the Southern District of New York, the defendant SALVATORE COLETTA, who during the calendar year 1971 was married, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1971, by preparing and causing to be prepared a false and fraudulent joint income tax return on behalf of himself and his wife which was filed with the Internal Revenue Service, wherein it was stated that their taxable income for said calendar year was the sum of \$256,295.00 and that the amount of tax due and owing thereon was the sum of \$134,639.00, whereas as he then and there well knew, their taxable income for said calendar year was approximately the sum of \$295,612.35, upon which said taxable income they owed to the United States of America an income tax of \$169,902.74.

2. The unreported income in the approximate amount of \$39,317.35 represented cash kick-backs paid to and on behalf of defendant SALVATORE COLETTA by officials and employees of various wholesale suppliers of meat products in return for purchases of meat products by Hills Supermarkets, Inc.

(Title 26, United States Code, Section 7201)

FOREMAN

PAUL J. CURRAN
United States Attorney for the
Southern District of New York

WIA:jbm

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA, :

Plaintiff, : 74 Cr.289 (HFW)

-against- :

SALVATORE COLLETTA, : NOTICE OF MOTION

Defendant. :

-----X

S I R:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Robert E. Goldman, duly sworn to the 7th day of April, 1976, the proceedings had heretofore and the trial transcript in the case of United States of America against George Gamaldi, the defendant will move this Court, before the Hon. Henry F. Werker, U.S.D.J., at the Courthouse located in Foley Square, Borough of Manhattan, City and State of New York, on the 27th day of April, 1976, or such earlier date as is convenient to the Court, at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order pursuant to Rule 12 of the Federal Rules of Criminal Procedure dismissing the indictment herein, and for such other further and different relief as to the Court may seem just and proper.

Dated: New York, New York
April 7, 1976

Yours, etc.

KUH, SHAPIRO, GOLDMAN,
COOPERMAN & LEVITT, P.C.

TO: JOINT STRIKE FORCE
ON ORGANIZED CRIME
One St. Andrews Plaza
Foley Square
New York, N.Y. 10007

By Robert E. Goldman,
A Member of the Firm
Attorneys for Defendant
Office & P.O. Address:
800 Third Avenue
New York, New York 10022
Tel. (212) 688-7900

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff, : 74 Cr.289 (HFW)

-against-

: AFFIDAVIT

SALVATORE COLLETTA,

Defendant. :

STATE OF NEW YORK)

:SS.:

COUNTY OF NEW YORK)

ROBERT E. GOLDMAN, being duly sworn, deposes
and says:

That he is an attorney-at-law, duly admitted to
practice before the District Court for the Southern District
of New York, represents the defendant Salvatore Colletta
herein, and makes this affidavit in support of the motion
to dismiss the indictment herein pursuant to Rule 12 of
the Federal Rules of Criminal Procedure.

Simultaneously with this motion there has been
handed to the Court a copy of the transcript in the trial
previously completed of George Gamaldi, which trial was
conducted before this Court commencing November 10, 1975.

There is also being handed to the Court upon the
motion herein a Stipulation wherein the government acknowledges
that the evidence to be presented against Salvatore Colletta,
formerly a co-defendant of Mr. Gamaldi, is in all material

respects the same as that presented against Mr. Gamaldi. The Court thus having a preview of the evidence to be presented against Mr. Colletta, the motion is herein made to dismiss the indictment upon the ground that the government has failed to establish a prima facie case or the existence of any case that would warrant submission to a jury.

Deponent is aware that the Court to whom this motion is being presented presided over the trial of Mr. Gamaldi and is familiar with the proceedings had therein. However, in recognition of the fact that the Court is normally burdened with numerous matters, a short review herein merely for purposes of describing the motion shall be offered.

At the trial of George Gamaldi the government in essence offered a single witness, i.e., Moe Steinman. Mr. Steinman alleged that while he made monthly cash payments averaging some \$23,000 to George Gamaldi and/or Salvatore Colletta and/or Blaze Iovino, he was unable to specify to whom he actually made such payments. The best Mr. Steinman can offer is he made the payments to two out of three of the aforesaid individuals, but did not or could not identify which two out of the three were in fact the recipients of the alleged payments. Aside from his inability to designate the

recipients of the alleged payments, Mr. Steinman could not identify the dates of the alleged payments, the times of the alleged payments, the places of the alleged payments, or the amounts of the alleged payments. He could not, as aforesaid, specify who was present when the alleged payments were made, and offered no proof as to the source of the funds with which he made such payments or any documentary evidence upon which he or anyone else could ascertain the amount of the payments which were allegedly due.

Such records as Mr. Steinman indicated may have existed at one time or another, were either intentionally destroyed by Sol Steinman or destroyed in an unsolved act of vandalism a few short days before the District Attorney's office of the County of New York executed upon Mr. Steinman and his companies a search warrant for the seizure of such records.

To embellish this bleak recital, the government offered testimony of two events in the hopes that such events would generate a series of inferences leading to the technical requirements of establishing a prima facie case. In essence, Steinman testified to a conversation allegedly held with Salvatore Colletta and Blaze Iovino in 1968 wherein Mr. Colletta and Mr. Iovino indicated their intention to take in George Gamaldi as a partner sometime in the future. The other incident occurred either in the year 1970 or 1971 (the only two fact witnesses produced by the government could not agree upon the year) wherein a payment in an unspecified amount

was made at a time when all three individuals were present and Sol Steinman, the brother of Moe Steinman (whose presence at the meeting could not be explained by Moe Steinman) helped "even out" the money.

From such evidence, a court and/or jury would be asked to speculate beyond a reasonable doubt that Salvatore Colletta received \$80,000 in the year 1968, \$92,000 in the year 1969, \$95,000 in the year 1970 and \$40,000 in the year 1971, or a substantial amount thereof.

It is respectfully submitted that the government has presented no case which can withstand a motion for dismissal as lacking a prima facie case, or any case upon which a jury would be entitled to speculate.

It has been conceded by the government to this Court that there is no basis to bring a conspiracy charge or acting in concert charge against any of the defendants heretofore indicted among which is Salvatore Colletta. In fact, no such charge has been made. There is only the substantive counts of income tax evasion alleged for each of the years 1968 through 1971 against Mr. Colletta.

In order to present a semblance of the case, it is essential for the government to prove and/or present evidence that in each of the years named in the indictment Mr. Colletta actually received approximately \$85,000, or a substantial amount thereof; that he failed to declare this amount of money upon

his income tax returns and wilfully failed to pay any tax due thereupon.

Suffice it to say the evidence, such as it is, against Mr. Colletta is wholly circumstantial and the standards by which a prima facie case are to be evaluated must be those pertaining to a circumstantial case. That the case is circumstantial is without question. Mr. Steinman being unable to testify as to the direct payment to Salvatore Colletta - his inability to name who was present at any particular payment - requires that payment to Mr. Colletta must be inferred from the two incidents set forth above. Taken directly, the maximum amount of money which could have been paid to Mr. Colletta at those incidents totals less than \$11,000 - hardly enough to reach the substantial amount necessary to sustain the government's burden. All other payments must be inferred, either by virtue of the partnership conversation alleged, or by virtue of Sol Steinman's "evening out" the money at the single incident in either 1970 or 1971. As to the second meeting taken at its best, speculation and guesswork is required as to whether it happened in the year 1970 or in the year 1971 since payments to any defendant must be established with regard to a particular year with regard to the charge of income tax evasion.

Thus as a direct case, the government's presentation is nonexistent in terms of establishing its burden of proof.

Similarly, it is insufficient as a circumstantial case.

The circumstantial case as presented by the government simply requires too many inferences to be piled on top of too many inferences to justify proceeding further.

As will be dealt with in an accompanying Memorandum of Law, it is respectfully submitted that a circumstantial case with regard to income tax prosecutions normally follows the following pattern. The government having no direct proof of payments proceeds upon a net worth theory, unexplained assets or unexplained expenditures. Thus, there can be inferred from such unexplained assets or expenditures the receipt of income which was not shown upon the tax returns. That is the circumstantial case as normally defined under the income tax evasion statutes. Deponent is wholly unaware of a circumstantial case which has neither a showing of unexplained net worth, unexplained assets, unexplained expenditures, and no direct proof of payment sufficient to sustain its burden under the indictment brought.

A mere partial cataloging of the inferences required to come to a conclusion in favor of the government in the instant case demonstrates the poverty of the government's presentation. As aforesaid, there was no direct evidence of specific amount of money paid to Mr. Colletta. A jury would be required to speculate premised upon a single conversation in which there was stated a future intention to make George

Gamaldi a partner in possible future payments as may be made that in fact the payments actually were made. From there the jury must infer in what amounts the payments were made and how much of those amounts actually reached the pocket of Mr. Colletta. There would then be required an inference as to in what year such amount was received by Mr. Colletta. As to that, the second incident cited for the government is wholly insufficient. The recitation of a single incident in 1970 or 1971 cannot fill in the gap. In the first instance it would require unwarranted inferences as to what occurred in the intervening years in terms of the receipt of money by Mr. Colletta. Secondly, since the only two witnesses presented by the government cannot agree in which year the meeting took place, there can be no finding as to any direct payment recited at that meeting since a jury would be required to speculate if the payment was received in 1970 or 1971. Even that meeting is insufficient since although Sol Steinman stated he helped "even out" the money, there is no testimony that anyone actually saw Mr. Colletta receive any portion of the "evened out" money. So again another inference is required. Pyramided on top of all of these inferences is then required the normal inference that the receipt of income was intentionally not reported by Mr. Colletta and he wilfully intended to evade the payment of taxes. While such an inference is normally permitted, it is

permitted only upon a substantial and firm foundation of proven fact from which a jury can make such an inference. When such an inference is required on top of foundational facts, which in and of themselves are only established on the bases of tortured inferences, the case must topple of its own weight.

As stated by this Court earlier at the conclusion of the trial of George Gamaldi, the evidence presented by the government is "purely conjectural". The Court further stated that a jury would be asked to speculate completely as to whether or not a substantial amount of tax was due by the substantiality of the amount of which which becomes due which depends upon the jury speculating as to what bribes were in fact taken and it would be improper as a matter of law to ask a court or jury to speculate upon speculation.


Simply stated, a jury would have to speculate as to how much money Mr. Colletta received, it would have to speculate in what year it was received, it would have to speculate what portion of the money allegedly paid by Mr. Steinman Mr. Colletta actually received, it would have to speculate if the partnership actually materialized, it would have to speculate if the partnership pertained in all four years or in any one of them, it would have to speculate as to what exactly an average of \$23,000 a month meant. The speculations are infinite and only a few are detailed here.

On top of those speculations there would then be required the normal speculations as to wilfullness and intent.

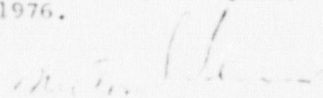
All of these speculations would be premised upon the uncorroborated testimony of a biased self-confessed liar who obtained the equivalent of a plea to a single misdemeanor and the outright dismissal of several indictments against himself and all indictments against his brother and son-in-law - whose testimony cannot be supported by any documentary evidence, it having been destroyed intentionally or in an unsolved act of "vandalism" shortly before the records were the subject of a search warrant by a law enforcement agency.

The future of no human being should be submitted to such a game of chance.

WHEREFORE, it is respectfully requested that the indictment herein be dismissed.


Robert E. Goldman

Sworn to before me
this 20 day of April,
1976.



Notary Public
MILTON S. SIKES
Notary Public, State of New York
No. 25892
Qualified on 12/22/75
Certificate filed in New York County
Term Expires March 20, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	74 Cr.289 (HEW)
	:	
-against-	:	<u>STIPULATION</u>
	:	
SALVATORE COLLETTA,	:	
	:	
Defendant.	:	

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IT IS HEREBY STIPULATED by and between the parties hereto as follows:

Simultaneously with the submission of this Stipulation, there is being submitted to this Court a copy of the transcript of trial of George Gamaldi, 74 Cr.289, and a motion brought by the instant defendant seeking dismissal of his indictment.

For purposes of the motion being submitted herewith on behalf of Salvatore Colletta seeking dismissal of his indictment the parties hereto stipulate that the evidence offered against George Gamaldi as set forth in the transcript referred to hereinabove is in all material respects similar to the evidence that the government will offer against Salvatore Colletta.

IT IS FURTHER STIPULATED that any time spent by the District Court in deliberating upon and determining the motion,

as well as any appellate review that might thereafter follow shall not be a basis of any claim by the defendant Salvatore Colletta that his right to a speedy trial was in any way denied. The defendant waives no rights with regard to any events or remedies to which he may have been entitled, or which may have accrued prior to ~~March 24~~ ^{Mar. 24}, 1976.

For purposes of the instant motion only, it is further stipulated that the tax returns of Salvatore Coletta for each of the years 1968, ~~1969~~ ¹⁹⁶⁹ and 1971 were prepared in the Southern District of New York and showed the following income from salary, interest income and capital gains and reported no income from kickbacks:

	<u>Gross Income</u>	<u>Tax Paid</u>
1968	45,000.00	3,910.00
1969	66,614.00	15,895.00
1970	73,950.00	18,176.00
1971	295,884.00	134,639.00

Dated: New York, New York
April , 1976

JOINT STRIKE FORCE ON
ORGANIZED CRIME

By _____
Barbara Ambler

Robert E. Goldman
Attorney for defendant
Salvatore Colletta

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

UNITED STATES OF AMERICA :

- v - :

SALVATORE COLETTA, :

Defendant. :

- - - - - x

STATE OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

AFFIDAVIT IN RESPONSE

74 Cr. 289

(HPW)

BARBARA S. AMBLER, being duly sworn, deposes and says:

1. I am a Special Attorney for the United States Department of Justice assigned to the Southern District of New York. As such, I am in charge of the prosecution of the above captioned case. I submit this affidavit and the attached memorandum of law, in opposition to defendant's motion for dismissal of the indictment herein pursuant to Rule 12 of the Federal Rules of Criminal Procedure.

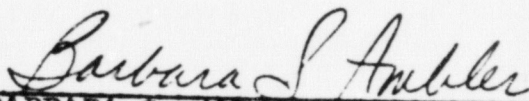
2. Defendant in making his motion for dismissal draws factual conclusions, some of which are not supported by the record. For instance he claims the Government offered but a single witness as to bribe payments and no proof as to the source of the funds for these payments. Sol Steinman was not only a second witness to one of the monthly payments, he also testified that he was the source of funds for the bribes and that he obtained these monies through a phony invoice and check cashing scheme. Further, even if Moe Steinman was the only witness, defendant cites no authority for the proposition that more than one witness is required for the Government to sustain its burden in a criminal tax prosecution. In fact, defendant cites no authority for his conclusion that the

2.

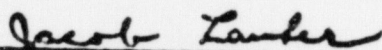
3. The Government sets forth its version of the facts cited to the trial transcript in its attached memorandum of law. Further, the memorandum will deal with the elements of the crime of tax evasion and the evidence which the Government believes more than satisfies these elements as well as case law supporting this proposition.

4. Finally, it should be noted that proof of Mr. Coletta's presence in Manhattan to receive a bribe payment during each of the tax years is not required for venue purposes in this case, as it has been stipulated that his returns were prepared in the Southern District of New York during the relevant years.

WHEREFORE, based on the foregoing as well as the attached memorandum of law, the Government respectfully requests that defendant COLETTA's motion to dismiss the indictment be denied.


BARBARA S. AMBLER
Special Attorney
United States Department of Justice

Subscribed and Sworn to before me
this 20th day of April, 1976


Notary Public

JACOB LAUFER
Notary Public, State of New York
No. 24-4609171
Qualified in Kings County
Commission Expires March 30, 1977

RECEIVED IN CHAMBERS
OF JUDGE HENRY F. WERKER

MAY 5 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

UNITED STATES OF AMERICA, :

- v - :

SALVATORE COLETTA, :

Defendant. :

74 Cr. 289

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GOVERNMENT'S MEMORANDUM OF LAW

ROBERT B. FISKE, Jr.,
United States Attorney for the
Southern District of New York
Attorney for the United States of America

BARBARA S. AMBLER,
Special Attorney,
Department of Justice,
Of Counsel.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA	:	74 Cr. 289
- v -	:	
SALVATORE COLETTA,	:	
Defendant.	:	

-----X

GOVERNMENT'S MEMORANDUM OF LAW

THE FACTS IN THE GAMALDI TRIAL RECORD
ESTABLISH A PRIMA FACIE CASE

The facts in the Gamaldi trial record present more than ample evidence to establish that in 1969, 1970, 1971, and 1972, the defendant Coletta received a substantial amount of taxable income in each which he wilfully failed to report in order to evade payment of his taxes. This evidence was introduced through the testimony of Moe Steinman and his brother Sol Steinman.

FACIS:

1. On February 23, 1968, Moe Steinman met Salvatore Coletta and Blaise Iovino at the El San Juan Hotel, Puerto Rico (Tr. 41). At that time Sal Coletta was a vice president of Great Eastern Supermarket and Iovino was a meat buyer for the same company. Great Eastern had just merged with Hills Supermarkets and the defendant and Iovino were about to take over the meat department at Hills (Tr. 39; 195). At this meeting, Steinman told Coletta and Iovino that he had been doing business with Hills and had paid kickbacks to the previous Hills meat buyer, George Gamaldi. The three men agree to

2.

meet again back in New York (Tr. 41) . Once back in New York, Steinman agreed to make kickback payments to Coletta and Iovino so many cents per pound of meat that Hills bought from his company, Trans World Fabricators (Tr. 44; 36).

2. The kickbacks began in April of 1968 to Iovino and Coletta (Tr. 44-45; 206), and they subsequently told Steinman in April or May of 1968 that they were taking George Gamaldi in, as an equal partner in the kickback scheme (Tr. 48-49). Further, George Gamaldi then showed up with Iovino and Coletta for the June, 1968 kickback payment meeting (Tr. 49).

From approximately June of 1968 until the end of 1971, during the first ten days of each month, Moe Steinman paid an average of \$23,000 in cash kickbacks to the three supermarket executives (George Gamaldi, Blaise Iovino and Sal Coletta) to secure the purchase of meat by their supermarket, Hills, from Steinman's wholesale meat company (Tr. 49-50; 202).

3. Each month from June, 1968 until December, 1971, Steinman would meet all three men or with at least two out of the three of the supermarket buyers at various places in Manhattan and Long Island to pay them the cash kickback. These locations included Patrick's Pub, Scoopies' Diner, the North Shore Restaurant, and a "motel on Exit 51," all on Long Island, as well as Andre's, the Luxor Baths and Steinman's apartment, all located in Manhattan. Payments were also made at Sol Coletta's home (Tr. 50-51). The amount of the kickback was determined from records Sol Steinman kept of the amount of the Steinmans' company's business with Hills, which he would give monthly to his brother Moe (Tr. 273). George Gamaldi kept the monthly records for the Hills' buyers and Sol Steinman would call Gamaldi each month to compare their

figures and reconcile any error as to the total amount of the kickback (Tr. 273; 204). Sol Steinman would call Gamaldi or Iovino weekly to take Hills meat orders and to ask what amount they wanted added on to the price for a kickback (Tr. 272).

Sol Steinman, who ran Trans World with Moe Steinman, obtained the cash he gave to Moe Steinman from a phony invoice and check cashing scheme (Tr. 275).

4. At a particular meeting at the Luxor Baths in Manhattan, in the beginning of 1969, Moe Steinman met with Gamaldi, Iovino and the defendant Coletta, and the four men agreed to adopt the code word "street" when ordering meat over the telephone to represent the amount of pennies per pound kickback which was to be added on to the wholesale price (Tr. 52-53).

In late 1970 or 1971 Moe Steinman paid one of the regular monthly cash payments to Gamaldi, Iovino and Coletta at Coletta's home, in the presence of Sol Steinman. At this meeting both Moe and Sol Steinman saw the three buyers split the cash payment into three equal stacks (Tr. 60-61; 276-77).

5. It has been stipulated for purposes of this motion that the tax returns of Salvatore Coletta from 1968 through 1971 were prepared in the Southern District of New York and reported no income from kickbacks. At a trial of Mr. Coletta, an expert witness from the Internal Revenue Service could be expected to testify that if Coletta received one third of the monthly kickbacks testified to by Steinman, his returns, in failing to report this income, show a deficiency in the tax paid for each of these years. Further, at a trial of defendant Coletta, the accountant who prepared his returns could be expected to testify that Coletta did not inform him of this kickback income.

LAW:A. Existence of a Tax Deficiency

The testimony of Moe Steinman, if believed, establishes unreported income to the defendant Coletta of one third of \$23,000.00 per month from June, 1968 through the end of 1971. The Government is not required to prove the precise amount by which a defendant understated or underreported his income, United States v. Pawlak, 352 F. Supp. 794 (D.C.N.Y. 1972). See also, United States v. Rischard, 471 F.2d 105 (8th Cir. 1973). (Nor need the Government show the exact amount of the tax evaded.)

The Government need only establish that the income was understated by a substantial amount. United States v. Marcus, 401 F.2d 563 (2d Cir.), cert. denied, 393 U.S. 1023 (1969). In Marcus the defendant underreported his income by amounts ranging from \$9,000.00 to \$26,000.00 per year and this was found to be "substantial". From Steinman's testimony, in this case, a jury could find that the defendant received approximately \$7,000.00 per month for the tax years in question, which he failed to report. This amount computed out per tax year far exceeds the amounts found to be substantial in Marcus and Pawlak. (In Pawlak, the Government showed only \$5,000.00 of underreported income for one of the tax years.)

B. Attempt to Evade

The law is clear that the filing of a false income tax return constitutes an attempt within the meaning of 26 United States Code, Section 7201, United States v. Pawlak, supra. Clearly if Coletta received the bribes Steinman claims he did, he fraudulently understated the taxable income on his return and this constitutes an attempt to evade the assessment of taxes. United States v. Stein, 437 F.2d 775 (7th Cir.) cert. denied, 403 U.S. 905 (1971).

C. Wilfulness

Direct proof of wilfulness is not necessary. This may be inferred from failure of the defendant to supply records of the non-reported income to his accountant. United States v. Williams, 470 F.2d 915 (2d Cir. 1972), United States v. Frank, 437 F.2d 452 (9th Cir. 1971). Wilfulness may also be shown through evidence of extensive dealings in cash. United States v. White, 417 F.2d 89 (2d Cir.), cert. denied, 397 U.S. 912 (1969); United States v. Callanon, 450 F.2d 145 (4th Cir. 1971). In fact, any conduct, the effect of which is to conceal and mislead suggests wilfulness. In this case, the defendant failed to report the bribe income to his accountant, received all bribes in cash, and, along with Steinman and the two other buyers, agreed to the use of a code word over the telephone to conceal receipt of the bribe income.

CONCLUSION

The Government respectfully submits that from the testimony of Moe Steinman and Sol Steinman⁴ *as well as the other stipulated facts* a jury could find that Salvatore Coletta evaded his income taxes for the years 1968, 1969, 1970, and 1971.

Respectfully submitted,

ROBERT B. FISKE, Jr.
United States Attorney for the
Southern District of New York
Attorney for the United States of America

BARBARA A. AMBLER,
Special Attorney,
Department of Justice,
Of Counsel.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

:

74 Cr. 289

- v -

:

SALVATORE COLETTA,

:

Defendant.

:

-----x

DEFENDANT'S MEMORANDUM OF LAW

STATEMENT

The Government contends herein that a prima facie case exists with regard to the prosecution of Salvatore Coletta. It is respectfully submitted that no prima facie exists.

In the Government's Memorandum of Law submitted herein, an attempt is made to suggest the existence of a prima facie case. That said presentation might possess even superficial appeal is attributable only to ignoring the fundamental prerequisites of a prima facie case, the rules of evidence, and, most significantly, substituting in the Memorandum of Law statement of hard facts a conclusion that could only be arrived at after pyramiding inferences.

The record in no way supports the bold assertion of hard fact as set forth in the sketchy outline presented to the Court in support of the contention as to the existence of a prima facie case.

The defendant will demonstrate the lack of a prima facie case hereinafter. However, to limit the discussion to that aspect is to beg the question. The procedure with regard to this application was proposed by the Government. With commendable concern for judicial economy, the Government acknowledged that the evidence against Coletta would in all substantial regards be the same as that previously presented against George Camaldi. Thus, the suggestion was made that since the evidence was already a matter of record the matter could be reviewed by the Court to determine whether or not further prosecution was legally justified. It would seem that having made the proposal, the Government was not suggesting that their position ought to be maintained upon the merest technicalities if, in fact, no reasonable jury could ultimately find in the Government's favor beyond a reasonable doubt at the end of an extended trial. Thus, unlike other pre-trial motions addressed to the sufficiency of the indictment, this case is unique in that there exists a full trial transcript and an invitation by the Government to have

any shortcomings or defects in their case ruled upon in advance of trial so as to spare the Courts, the Government and the defendant the time and expense of what might be a fruitless exercise.

It belies reason for the Government to propose to the Court a pre-trial evaluation of the case upon a lengthy record and then ask the Court to ignore the sketchiness of the Government's proof, necessary conclusions premised upon unjustified inferences, gaps in the Government's evidence, contradictions between the only two Government fact witnesses and the inability of those witnesses to specify times, dates or places. This inability to sufficiently designate times, dates and places negates the sufficiency of the Government presentation. Further, the inability of the Government witnesses to testify as to time, date and place of all but two out of approximately thirty-six supposed meetings is a denial of due process in that no defendant would be given the opportunity to present a defense against such vague allegations. How can a defendant prove that he was not at a particular place, the specifics of which he is never advised? As to the only two meetings seemingly identified, one is a general conversation only and as to the

other, the Government witnesses cannot agree as to which year it occurred. Nor could they agree as to any of the other essential details of what allegedly transpired.

It is respectfully submitted that since the Government made the proposal to seek a judicial evaluation in advance of trial, in the interests of judicial economy, there is no disability to the Court evaluating all of the factors that would justify dismissing the indictment in the interests of said economy.

THE FACTS IN THE GAMALDI TRIAL RECORD
DO NOT ESTABLISH A PRIMA FACIE CASE.

Even by the most technical and restricted view, the Government has failed to establish a prima facie case. The Government's position and the cornerstone upon which they rely is the conclusory statement found in their memorandum (p. 4), i.e.,

"The testimony of Moe Steinman, if believed, establishes unreported income to the defendant Coletta of one third of \$23,000.00 per month from June, 1968 through the end of 1971."

That is the basic fallacy in the Government's position. The testimony of Moe Steinman, if believed, does not establish the facts as concluded by the Government.

Simply stated, if the testimony of Steinman were believed there is still no direct evidence of the receipt of money by Coletta in sufficient amount to sustain the instant indictment.

The instant case is an income tax prosecution. It is not a conspiracy prosecution, nor any of the other kinds of prosecutions where generalities will suffice to overcome the lack of hard fact. The threshold fact for the Government to prove in order to proceed further is that the money alleged in the indictment, or a substantial amount thereof, was actually received by Mr. Coletta. Simply stated, the testimony of Mr. Steinman falls short in that regard; its sum total does not place the sufficient amount of money in Mr. Coletta's pocket. Mr. Steinman stated that he could not particularly identify Mr. Coletta as being present at any but two out of thirty-six meetings which allegedly occurred. Steinman stated that while two out of the three generally appeared, he could not identify which two out of the three.

As to the two remaining meetings, even they, taken at face value, do not place a dollar in Mr. Coletta's pocket. As to the alleged meeting at Mr. Coletta's house -- in any

event insufficient because the year in which it occurred could not be identified upon the Government's case -- the only testimony was that of Sol Steinman in that he "helped even out the money." There is no testimony that any of the "evened out" money was actually received by Mr. Coletta or, in fact, any details of what happened to it after it was "evened out."

As to the other meeting which concerned itself with an alleged payment made in 1968-- which in any event was insufficient in amount under the allegations contained in the indictment to withstand dismissal -- even there the testimony was limited to Mr. Coletta's presence at the meeting with no testimony having been offered that he was the actual recipient of any money allegedly passed, or that he received any portion of any money allegedly passed to some other person present. Again, vague generality with its superficial appeal was substituted for hard fact. However, "atmosphere" or "suspicion" is no substitute for hard fact in establishing the existence of a prima facie case.

The fact is that Steinman's testimony, if believed,

requires a triple tiered set of inferences to arrive at the conclusion necessary to sustain the burden of a prima facie case. Since there is no direct testimony as to the receipt of money in sufficient sum by Coletta, an inference is required to conclude that he did in fact receive such money. Then a Court and jury must, on top of that inference, infer the amount and the year in which such money was received. Added to those two preliminary inferences is required a third inference, to wit, that he willfully failed to report said income.

It is respectfully suggested that the third inference, i.e., willfullness, is a normal inference required in the best of cases since state of mind is normally only proven by such an inference. However, the inference becomes acceptable only when such inference is premised upon hard established fact from which the inference is generated. Even that normal and usual inference is not permitted when it itself is required to be inferred from a basic fact which itself is an inference. Where, as here, two inferences are required before arriving at the third essential element, it becomes wholly unacceptable under our system of justice.

It is e that an income tax prosecution can be successfully brought premised upon circumstantial evidence. However, in an income tax prosecution the nature of the circumstantial evidence has been clearly defined and precise patterns have developed. In cases where there is no direct evidence of the receipt of funds a circumstantial case is perfected by establishing a defendant's net worth that can in no way be justified by the income he reports or by a history of unexplained disbursements which again amount to a figure unexplainable by the reported income. From those two tangible and precise facts an inference may be drawn that a defendant has received money which he has not reported on his income tax returns. In the instant case there is no evidence whatsoever of unexplained disbursements, nor of any net worth in excess of that which could be easily accounted for by the income which Mr. Coletta reported. Lacking direct evidence of the receipt of funds, lacking evidence as to net worth unexplained by reported income, and lacking evidence as to disbursements in excess of reported income, no case, prima facie or otherwise, exists that will support an income tax indictment.

It should be noted, as conceded by both parties, that Mr. Coletta during the period covered by the indictment reported several hundreds of thousands of dollars of income and paid several hundreds of thousands of dollars in taxes. The significance is twofold. Any direct evidence which may tortuously exist in the instant case does not involve such amount of money that could be considered substantial when measured against the allegations of the indictment, or substantial when measured against Mr. Coletta's reported income.

The instant case goes even further in discrediting a prima facie case premised upon the myriad of inferences required herein. A circumstantial case requires that there must be excluded any other contradictory reasonable inferences. The gamut of acceptable inference runs from exclusion of every inference except that pointing to guilt to, at the minimal level, excluding any reasonable inference but that of guilt. In the instant case, the facts as testified generate innumerable instances and the ones adverse to the concept of guilt are at least as minimally compelling as those pointing to guilt. The record reveals that the

*credibility
for jury*

prime Government witness testified only after receiving from the Government an exceedingly advantageous plea bargain. Indictments against his brother and his son-in-law were dismissed. The plea which Steinman received was, in light of his past history and the charges under which he faced conviction, to say the least, modest if not ridiculously so. Steinman also faced substantial tax difficulties of his own for failure to report millions of dollars which he was known to have received. Thus his compulsion was twofold. One was to insure the goodwill of the Government with regard to the pending criminal charges against him, and secondly, the necessity of relating a story which would divest him of the millions of dollars which he was known to have received. Under those circumstances the inference is minimally equal that the story he tells in this trial is a fabrication or distortion prompted by the necessity of obtaining Governmental leniency for himself and his family and avoiding a tax liability which he could never meet. This inference becomes all the more compelling when, as the record reveals, Steinman was unable to produce a single document to corroborate his story, was unable to specify a particular date as to any event for fear the defendants might possess hard fact to

prove their whereabouts elsewhere, could not or did not spell out the source of the funds in the amount alleged to have been paid to the defendant, only made sales to Hill's Supermarket in an amount that could never have justified in excess of one million dollars in kickbacks, and explained the loss of the records which might have substantiated his story with a tale that offended credulity.

Those facts, which at the invitation of the Government, the Court may review, clearly generate a countervailing inference to that of actual guilt in a quantity and quality at least equal to the inference required to establish guilt. Thus, in sum, if the Government relies on the direct case, it has none. To the extent the Government is forced to rely on a circumstantial case, it similarly has none. The circumstantial case would rely on triple tiered inferences which in and of itself is not permissible. Assuming arguendo, that that threshold obstacle could be overcome, the record reveals countervailing inferences which preclude the possibility of legal guilt.

The Government may not complain if the Court

reviews the entire record in assessing the existence of a prima facie case. Normally a court is forced to make such assessment upon mere legal conclusions without the slightest indication that such conclusions are arrived at by virtue of direct evidence or circumstantially. However, there is no disability from a court reviewing all the relevant intelligence that is available at the time a determination is requested even if requested before trial. In the instant case the Government has requested the review and stipulated that same shall be on the basis of the Gamaldi record. To ask the Court to ignore that record and the relevant factors contained therein is wholly unwarranted and counterproductive to the very purposes for which the proposal was made. Upon the record there does not exist a prima facie case against Mr. Coletta.

OTHER FACTORS WHICH MAY PROPERLY
BE CONSIDERED IN THE DISPOSITION
OF THIS MOTION.

In the foregoing section, it was demonstrated that the Government's case was quantitatively lacking in establishing a prima facie case as a matter of law. In this section it shall be demonstrated that the Government's case is both

quantitatively and qualitatively lacking in sufficient evidence so as to justify a finding of guilt by any reasonable jury.

It requires no undue repetition to assert that the triple tiered inferences referred to hereinabove would similarly preclude a jury from a finding of guilty upon all of the evidence. A jury ought not be permitted to speculate to such an unlimited extent that any finding must of necessity lack any of the precision or due process requirements to which a defendant is entitled.

In terms of due process requirements, a defendant is entitled to have the charges and the evidence set forth with such specificity that he can adequately prepare and present a defense. In the instant case that right is wholly denied.

Upon the testimony of Steinman there is virtually no evidence presented as to the time, the date, or the circumstances regarding substantially all of the alleged payments that were made to the defendant. At no time is he given a date which he could refute by the existence of other facts which he might possess. At no time is he given a specific place coupled with a date so as to enable him to

*bill's
parties*

establish his whereabouts elsewhere, if in fact he would otherwise be able to. At no time is he presented graphically with the source of the funds that he was alleged to have received, to wit, where Steinman got the money from in the amount of millions which were delivered to Mr. Coletta, Mr. Gamaldi and Mr. Iovino. He is thus denied the opportunity to attack as non-existent such funds. The Government does not present any evidence as to the possession of an unwarranted net worth or the making of unexplained disbursements-- a factor consistent with innocence-- by which means Mr. Coletta might further offer such evidence if it existed. Steinman testifies that such records as did exist were destroyed under circumstances that describe a coincidence that no reasonable mind could accept. In any event, such records are not forthcoming, again denying to defendant the opportunity to question and demonstrate their falsehood.

Thus, Mr. Coletta is in the unenviable position of having to prove a negative which, as a matter of pure mathematical logic, is incapable of proof. How can he possibly prove or establish that he did not receive the vast fortune suggested by Steinman, when he is not told where he was supposed to have received it, when he was

supposed to have received it, where the money came from that was utilized to pay him, etc., etc., etc. There is absolutely not a single fact which was definitively placed in evidence by the Government which would permit Mr. Coletta to bring forth proof to the contrary if it existed. If a place is mentioned, it lacks a date; if a month is mentioned, it lacks a date and a place; and if a year is mentioned, it lacks an amount, a date and a place. In the one incident which allegedly occurred at Mr. Coletta's house, the year in which such a meeting occurred is in doubt. One witness stated 1970; another, 1971. How could Mr. Coletta conceivably review his records, documents, whereabouts, or such other evidence as he may possess to establish his non-presence at a meeting upon an undefined date in a year which itself was undefined? He would be required to prove that he was not at home for every single Sunday over a period of two years. Even were he able to do that, he would then be faced with the problem that the two Government witnesses could not agree as to whether or not it was a Saturday or a Sunday. It is hardly due process to place a defendant in a position of having to defend himself with the requirement of proving a negative when he is not

afforded the minimal requirements of due process which will enable him to make such defense as is available to him.

The dilemma which Mr. Coletta faces is similar to that faced by a jury. They are faced with the problem of concluding the existence of monies for which no proof is produced. On the skimpiest of vague testimony a jury has to conclude that, in fact, Moe Steinman physically had in his possession over a million dollars which he passed to Mr. Coletta, Mr. Iovino and Mr. Gamaldi. They would have to speculate that in fact, the money existed, it was passed to Mr. Coletta in a vaguely described year, on a vaguely described date, at a vaguely described place as a result of inferences required to be drawn from two vaguely described conversations.

As an offsetting weight to these speculations, a jury would be required to evaluate the credibility of Mr. Steinman, not only as to his background but as to the recorded agreement with the Government by which he preserved his own future and that of his family. They would have to weigh the fact that the records that would have substantiated Mr. Steinman's story were allegedly destroyed in an unexplained act of vandalism on the eve of service by the

District Attorney's office of New York County of a search warrant for the seizure of such records. They would have to weigh the conflicting testimony between Moe Steinman and Sol Steinman, not only as to the single event allegedly occurring at Mr. Coletta's house, but also as to the fact that Moe Steinman vigorously denied stealing money from his own partner premised upon a story of fictitious payoffs which were never made. In addition to that incident, Steinman himself admitted that he had repeatedly taken money from persons upon a fabricated story that such money was necessary to pay off supermarket buyers and labor officials, when in fact no such payments were ever made. A jury would have to evaluate the fact that Steinman did not even appear to recognize a lie when in fact one existed, to wit, that when confronted with the fact that he had told Iowa Beef, etc. that he was required to make payoffs which in fact never existed, he would not admit that such story was a lie in order to obtain money, but rather merely "something to sell", which to his mind seemed perfectly permissible.

Finally, the jury would have to evaluate the fact that Steinman acknowledged on the stand that he lied all his life. A jury might easily conclude that a man who had lied all his life as an enabling tool to obtain money from partners, business associates and others, might feel no compunction at lying when his entire future was at stake.

When the above is measured against the skimpy inference-requiring evidence of the Government, it is respectfully submitted that no jury could reasonably conclude the guilt of Mr. Coletta beyond a reasonable doubt.

Thus, it serves little purpose for the Government to request that a court reach out tortuously to piece together a prima facie case which is skimpy at best, when in fact the legal restraints upon ultimate guilt are overwhelming. It would truly be contrary to the stipulation and the purposes for which the Government made the proposal to have a review made at this time.

In any event, the case is such that the defendant would be denied due process if it continued. An ensuing trial could be nothing more than a swearing contest. Any proceeding upon a criminal charge that could not rise above that level can hardly be said to afford a defendant due

process of law.

CONCLUSION

It is respectfully requested that the indictment herein be dismissed.

Respectfull, submitted,

ROBERT E. GOLDMAN, ESQ.,
Attorney for defendant,
Salvatore Coletta.

Copy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK-----x
UNITED STATES OF AMERICA :

- v - :

SALVATORE COLETTA, :

Defendant. :
-----xOPINION

74 Cr. 289 (HFW)

#44728

HENRY F. WERKER, D. J.

The defendant Salvatore Coletta was indicted in 1974 on four counts of income tax evasion for failing to report income he allegedly received in the form of bribes from 1968 through 1971. The Government has stipulated that the case against this defendant is based essentially on the same evidence as that presented against George Gamaldi in a previous trial wherein the same charges as these now pending against Coletta were dismissed. Coletta has moved to dismiss this indictment pursuant to Rule 12 of the Federal Rules of Criminal Procedure.

The Government's case against Gamaldi was replete with insufficient, speculative generalities instead of specific, concrete evidence. These shortcomings have not disappeared; the facts and evidence as presented now against Coletta remain exactly the same as they were against Gamaldi -- highly inadequate.

Largely on the basis of Moe Steinman's testimony, the Government claims Coletta was one of three persons receiving bribes averaging some \$7,000 monthly from June 1968 until December 1971. But the Government has not been able to document the specifics of who was involved, how much was paid, and where and when payment took place of any one particular transaction.

Steinman testified that monthly payments averaging \$23,000 total

were given to Gamaldi and/or Coletta and/or Blase Iovino at various places in Long Island and New York City. Record at 50-51. He was unable, however, to specify exactly to whom particular payments were made, and instead could only make a general claim that he always made these payments to at least two out of the three. Record at 50. While Steinman was able to estimate that an average of \$23,000 a month was paid, with a minimum of \$12-14,000 and a maximum of \$28-30,000, record at 51, he could not recall the exact amount of any one particular payment.

In certain instances during the Gamaldi trial, Steinman did give some specific details concerning particular alleged payments on direct examination, but on cross-examination his memories of the same incidents somehow eluded him. He recalled specifics of the alleged April 1968 and June 1968 payments, record at 45, 49-50, when questioned by the Assistant United States Attorney, but these recollections faded upon cross-examination by the defense attorney. Record at 202, 207.

The caliber of the Government's evidence is perhaps best demonstrated by quoting an excerpt from the trial transcript:

(Moe Steinman being cross examined by the defense counsel).

A That was the first kickback. That's where I don't know where we met. It was one of the restaurants in Long Island, I know it was Long Island.

Q How about the month of May?

A May, yes. That was in Patrick's Pub on Northern Boulevard.

Q How do you remember the month of May in Patrick's Pub?

A Because we had a little table in the back there that I recall and we had quite a few drinks to celebrate a new venture that I had with them. That was only Sol Coletta and Blase.

Q How do you know it was Patrick's Pub.?

A I remember because I was there.

Q How do you remember it was the month of May?

A It was the second time I met them. I was in a hurry

or they were in a hurry. I don't remember where we met. It was Long Island.

Q Do you recall the date of that meeting?

A No.

Q How about the month of June?

A I don't recall that.

Q Do you recall where that was?

A In Long Island.

Q Where, the place?

A Well, it could have been --

Q Not could have been.

Do you have any recollection of the place specifically?

A No, not sure.

Q Do you have a recollection of the date specifically?

A Only that I could only tell you the first of every month or the first week or the first ten days of every month.

(Record at 206-7).

Even in one case where Moe Steinman's testimony is corroborated in part by his brother Sol Steinman, another Government witness, there is an inconsistency. The two witnesses gave testimony concerning a meeting at Coletta's home where another payment allegedly took place, record at 60-61, 246-50, 276-77, but they could not agree as to whether the transaction took place in 1970 or 1971 nor was there any testimony as to actual receipt by Coletta of the "evened out" monies by the witnesses presented.

There is here an absolute absence of any evidence indicating unexplained expenditures by this defendant vis-a-vis the income reported or the establishment of his net worth. These are two significant circumstantial evidence areas which are subject to the inference of the receipt of money in excess of the reported income. The Government has merely presented evidence by the mastermind of the kickback scheme which is uncorroborated and upon cross-examination as to time and place nullified. From this testimony it is unreasonable to expect a jury to draw an inference beyond a reasonable doubt that in each of

three taxable years the defendant received approximately \$84,000 which he failed to report as income.

While the cases cited by the Government as to the precise amount, the substantial character, and the exact amount of tax evaded stand for the propositions stated, they do not apply here where the necessary circumstantial evidence from which an inference of receipt of funds is to be drawn is missing.¹

Thus many necessary, important details in the Government's case are missing; a jury would be required to fill them in by pure conjecture and inference based upon conjecture in order to find that a particular transaction actually took place.

The law in the Second Circuit today concerning the sufficiency of evidence necessary before a case may be sent to a jury requires a trial judge to:

"determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." United States v. Taylor, 464 F.2d 240 (2d Cir. 1972), quoting from Curley v. United States, 160 F.2d 229 (D. C. Cir.), cert. denied, 331 U.S. 837 (1947).

In my opinion, in this case there is no sufficient evidence upon which a reasonable person could fairly conclude beyond a reasonable doubt that the defendant Coletta is guilty of the crimes with which he is charged.

A District of Columbia Circuit case is analogous to the situation now before the court. In United States v. Bethea, 442 F.2d 790 (D. C. Cir. 1971), the defendant was convicted on two narcotics charges. Arrest was made and conviction followed on the basis of the fact that the defendant, who was a passenger along with two other men in a parked automobile, was sitting in proximity to the drugs in question. In addition, there were also three loaded guns in

the car, two of which were hidden beneath the defendant's seat. Aside from testimony verifying this set of facts, the Government utilized only one witness on direct examination, and offered no further evidence linking the defendant to the particular drugs or the use of drugs in general, nor any evidence showing that he was good friends with the other two men or even that he had spent the major part of the evening in question with them.

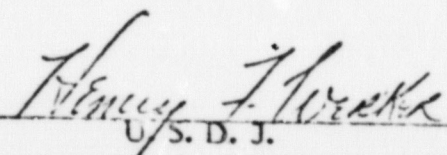
Recognizing the many gaps in the Government's case, the court there reversed the conviction. In so doing, the court stated, "[t]he trial judge should not allow the case to go to the jury if the evidence is such as to permit the jury to merely conjecture or to speculate as to the defendant's guilt." *Id.* at 792. Accord, United States v. Hill, 481 F. 2d 929, 931 (5th Cir.), cert. denied, 414 U.S. 1115 (1973); United States v. Bonham, 477 F.2d 1137, 1138 (3rd Cir. 1973) (en banc).

The Government's evidence in this case fares no better than the evidence in Bethea. In order to find the defendant guilty beyond a reasonable doubt on the facts, one must first infer, on the basis of the Government's sketchy evidence, that Coletta did indeed receive a substantial amount of money in bribes, secondly speculate as to the specific amount of money, further conjecture as to the particular year in which the alleged bribes were accepted, and finally conclude that Coletta willfully failed to report this income.

To send this case to the jury would be to ask a jury to build speculation upon speculation. The defendant's motion to dismiss the indictment is granted.

SO ORDERED.

DATED: New York, New York
July 7, 1976


U/S. D. J.

UNITED STATES v. SALVATORE COLETTA, 74 Cr. 289 (HFW)

NOTES

1. In its memorandum of law, the Government cites United States v. Pawlak, 352 F. Supp. 794 (S.D.N.Y. 1972), United States v. Rischard, 471 F.2d 105 (8th Cir. 1973), and United States v. Marcus, 401 F.2d 563 (2d Cir.), cert. denied, 393 U.S. 1023 (1969), in support of its contention that the exact amount of alleged understated income need not be proved. It cites United States v. Pawlak, supra, United States v. Stein, 437 F.2d 775 (7th Cir.), cert. denied, 403 U.S. 905 (1971), United States v. Williams, 470 F.2d 915 (2d Cir. 1972), and United States v. White, 417 F.2d 89 (2d Cir.), cert. denied, 397 U.S. 912 (1969), in reference to the elements of the crime of income tax evasion. This is essentially the extent of the authority used by the Government in its case against Coletta.

AFFIDAVIT OF MAILING

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

Barbara S. Ambler, being duly sworn, deposes and says that She is employed in the office of the Strike Force for the Southern District of New York.

That on the 20th day of September, 1976
She served 2 copies of the within brief and appendix
by placing the same in a properly postpaid franked envelope
addressed:

Robert Goldman, Esq.
800 - 3rd Avenue
New York City, New York

And deponent further says that She sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Barbara S. Ambler

Sworn to before me this
20th day of September, 1976

Steven K. Frankel
STEVEN K. FRANKEL
Notary Public, State of New York
No. 24-4607105
Qualified in Kings County
Commission Expires March 30, 1977